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LAI CHEE MENG

v.

ONG BENG LYE

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[ORIGINATING MOTION: R2-17-115-2007]
4 MAY 2010

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LEGAL PROFESSION: *Disciplinary proceedings - Disciplinary Body - Decision of - Appeal against - Complaint against solicitor acting for both parties in same suit - Conflict of interest - Solicitor ordered to pay penalty of RM3,000 - Breach of rr. 3 & 5 Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') - Consideration of - Whether consent in writing from client obtained before acting for opposing party in same suit - Whether Disciplinary*

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Body has power to impose fine - Legal Profession Act 1976, ss. 77(3) & 103E

LEGAL PROFESSION: *Conflict of interest - Professional conduct - Complaint against solicitor acting for both parties in same suit - Solicitor ordered to pay penalty of RM3,000 - Breach of rr. 3 & 5 of Legal Profession (Practice and Etiquette) Rules 1978 - Consideration of - Whether consent in writing from client obtained before acting for opposing party in same suit*

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LEGAL PROFESSION: *Professional discipline - Conduct of advocate and solicitor in professional capacity - Complaint against solicitor acting for both parties in same suit - Conflict of interest - Solicitor ordered to pay penalty of RM3,000 - Breach of rr. 3 & 5 of Legal Profession (Practice and Etiquette) Rules 1978 - Consideration of - Whether consent in writing from client obtained before acting for opposing party in same suit*

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This was an appeal by the appellant, an advocate and solicitor, to strike out or set aside *ab initio* the order made by the Disciplinary Board of the Bar Council ('DB') wherein the appellant was ordered to pay a penalty of RM3,000. The facts of this case arose in relation to the several complaints lodged by the respondent to the Bar Council against the appellant. The respondent's complaints were: (i) that while acting for the plaintiff in High Court Civil Suit No. S2-22-624-1996 ('1996 Suit'), the appellant had settled and filed an affidavit on behalf of the defendant, Kilang Papan Chuan Joo Heng Sdn Bhd ('Kilang Papan'), in the same suit, which concerned a claim for vacant possession of the plaintiff's property wherein the respondent was a sub-tenant ('Complaint 1') and (ii) the appellant had acted for Kilang Papan in High Court Civil No. S1-22-313-98 ('1998 Suit'), which concerned the same parties and subject matter to the 1996 Suit ('Complaint 2'). The DB formed a Disciplinary Committee ('DC') which proceeded to conduct its

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investigation and found that the appellant had breached rr. 3 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') and was liable for disciplinary proceedings under s. 77(3) of the Legal Profession Act 1976 ('the Act'). The DC also recommended a reprimand under s. 103C(1)(b) of the Act. The DB accepted the findings of fact by the DC but did not accept the recommendation that a reprimand be issued and went on to impose a fine of RM3,000 on the appellant. Hence this appeal. The appellant submitted, *inter alia*, that (i) his actions in relation to Complaint 1 did not constitute a breach of rr. 3 and 5 of the Rules because he had only provided assistance to Kilang Papan to draft the affidavit but not with the view of acting for it; (ii) he had obtained the necessary consent from the plaintiff in the 1996 Suit to act for Kilang Papan and therefore was not in breach of r. 5 of the Rules in relation to Complaint 2; (iii) the DB's decision was contrary to the findings of facts made by the DC and (iv) the DB had no power to impose a fine. On the other hand, the respondent contended, *inter alia*, that (i) the appellant had acted for Kilang Papan by assisting in preparing and filing the affidavit wherein he had used his professional skills; (ii) the appellant had breached r. 5 of the Rules since he did not obtain any written consent from the plaintiff in the 1996 Suit to act for Kilang Papan and (iii) the DB had the jurisdiction and power to impose a fine upon the appellant.

Held (dismissing the appeal with costs):

(1) The appellant had breached r. 3(a) of the Rules. As the plaintiff's lawyer in the 1996 suit, the appellant was privy to the plaintiff's confidential information. Thus, the appellant would not be in a position to advise Kilang Papan independently, as he would have to think of his own client's position. (paras 6 & 7)

(2) The appellant should not have prepared the affidavit for the other party in the legal proceedings. When an inherent conflict of interest arises, the appellant should have avoided his involvement in the defendant's case, *ie*, Kilang Papan. Conflicts of interest would undermine a client's expectation of effective legal representation and undermine a lawyer's ability to provide effective legal representation. (paras 9, 10, 13 & 14)

(3) Rule 5 of the Rules provides that an advocate and solicitor must obtain the consent of the first party which he acted for in writing before acting for the opposite party in later proceedings. There was no consent in writing here. (para 17)

(4) The DB's finding of facts was consistent with that of the DC. There was merely a question of the punishment on the appellant. Further, under the Act, the DB does have the jurisdiction and

power to impose a fine upon the appellant. Hence, the appellant's contention that the DB had no power to impose a fine was misconceived. (paras 19, 21 & 22)

Case(s) referred to:
Bar Council of Maharashtra v. MV Dabholkar, etc etc, AIR 1975 SC 2092 ***(refd)***
Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors [2009] 4 CLJ 303 CA ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 3, 5, 77(3), 103C(1)(b), 103D(2)
Legal Profession (Practice And Etiquette) Rules 1978, rr. 3(a), 5

For the appellant - Messrs HY Lee & Co
For the disciplinary board - Shamala Balasundaram; M/s Chooi & Co

Reported by Kumitha Abdul Majid

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This is an appeal by the appellant to strike out with immediate effect or to set aside *ab initio* the order made by the Disciplinary Board of the Bar Council ("DB") on 6 September 2007, ordering the appellant to pay a penalty in sum of RM3,000 ("the said order"). In addition, the appellant prays for the Bar Council to pay back the sum of RM3,000 to him.

[2] After considering the submissions filed by the parties, the court dismissed the appeal with costs.

Brief Facts

[3] The brief facts of the case are as follows:

(a) The appellant is at all material time an advocate and solicitor practicing in the Law Office of Messrs. Bahari, Choy & Nongchik at No. 50A, Tingkat 1, Jalan Tun Abdul Razak, 28400 Mentakab, Pahang Darul Makmur.

(b) By a letter of complaint to the Bar Council dated 7 May 2007 ("the complaint"), the respondent lodged several complaints against the appellant.

(c) The respondent's complaint was referred to an Investigating Tribunal ("IT"). The appellant provided a letter of explanation and further explanation on the matter set out in the complaint. After its investigation, the IT recommended a formal investigation by the disciplinary committee in respect of two of the seven complaints which were as follows:

(i) That while acting for the plaintiff in the Kuala Lumpur High Court Civil Suit No: S2-22-624-1966 ("the 1996 Suit"), the appellant had settled and filed an affidavit on behalf of the respondent, Kilang Papan Chuan Joo Heng Sdn Bhd ("Kilang Papan") in that suit. The 1996 Suit relates to a claim for vacant possession of a piece of land, identified as HS(D)799, PT 49 Sek 49A, Bandar Kuala Lumpur, from Kilang Papan in which the tenancy had been terminated *vide* Notice dated 16 September 1996. The said land was sub-let by Kilang Papan to the respondent (complaint 1);

(ii) Having withdrawn the 1996 suit (in which the appellant acted for the plaintiff), the appellant acted for Kilang Papan in High Court Civil No. S1-22-313-98 ("1998 Suit") in respect of a suit between the same parties to 1996 Suit involving essentially the same subject matter ("complaint 2").

(d) The IT found that complaint 1 was proved as the affidavit in question is in the record of complaint and the appellant admitted having taken instructions to settle the same and file such affidavit.

(e) The IT also found that complaint 2 was proved. The Tribunal however accepted the evidence of the appellant and the director of the defendant in the 1996 Suit that the relevant parties had no objection to the appellant acting for the defendant in the 1998 Suit.

(f) The DB thereafter formed a disciplinary committee which proceeded to conduct its investigation. On 19 June 2007, the disciplinary committee found as a matter of fact, *inter alia*, as follows:

(i) The appellant should not have prepared the affidavit of the other party to the legal proceedings. He had not only prepared it but filed and served it; and

(ii) The appellant had not obtained the written consent of the plaintiff to represent the defendant.

(g) The disciplinary committee found that the appellant had breached s. 3 and 5 of the Legal Profession Act 1976 ("LPA") and was liable for disciplinary proceedings under s. 77(3) of the LPA, The disciplinary committee recommended a reprimand under s. 103C(1)(b) of the LPA.

(h) The disciplinary committee's report was then considered by the DB. The DB effectively accepted the findings of fact by the disciplinary committee and the IT but did not accept the recommendation that a reprimand be issued. The DB, *vid*e a letter dated 15 August 2007, gave notice to the appellant to appear before the disciplinary board on 6 September 2007 to make representation before the DB decided on an appropriate order. On 6 September 2007, the DB went on to impose a fine of RM3000 on the appellant.

Appellant's Submission

[4] The appellant's submission are as follows:

(a) In respect of complaint 1, that his actions do not constitute a breach of r. 3 and r. 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ("the Etiquette Rules") because the IT has found that the appellant had only provided assistance to Kilang Papan to draft the said affidavit but not with the view of acting for the defendant. To support his submission, the appellant cited the case of *Mirza Mohamed Tariq Beg Mirza HH Beg v. Margaret Low Saw Lui & Ors* [2009] 4 CLJ 303 where it was held that in order to bar a solicitor from acting, it must first be established a relationship of solicitor and client or some other fiduciary relationship. The confidential information that was alleged and conveyance of the confidential information by the solicitor must also be proved;

(b) In respect of complaint 2, that the appellant had obtained the necessary consent of the plaintiff in the 1996 Suit to act for Kilang Papan and therefore was not in breach of r. 5 of the Etiquette Rules;

(c) That the DB's decision was bad in law as the board did not follow the rules and principles of procedural fairness and natural justice. Further, and/or in the alternative, the appellant submits that:

(i) the DB has rejected the recommendation made by the disciplinary committee before giving an opportunity to be heard to the appellant;

(ii) Appellant's presence in the hearing before the DB is thus meaningless;

(iii) the DB was oppressive in imposing a greater punishment without hearing the appellant first;

(iv) the DB made a decision which is contrary to the findings of facts made by the disciplinary committee; and

(v) the DB has failed, refused and/or neglected to give the appellant the opportunity to prove that he is not guilty towards the respondent's complaint when the DB decided to impose a greater punishment on the appellant.

Respondent's Submission

[5] The respondent's contentions are as follows:

(a) In respect of complaint 1, it is not disputed that the appellant had settled and filed an affidavit for the defendant in the 1996 suit. It is clear that doing so puts him in a position to be embarrassed and that this in breach of rules 3(a) of the Etiquette Rules. Assisting in preparing and filing an affidavit constitutes acting for the defendant. It was the appellant's professional skills that were being used to prepare and cause the affidavit to be filed.

(b) In respect of complaint 2, r. 5 of the Etiquette Rules clearly states that the applicant should have obtained consent "in writing". The appellant contends that he had verbal consent of the plaintiff in the 1996 Suit to act for Kilang Papan. Therefore, the rule is clearly breached.

(c) In respect of the allegations that the DB's decision was bad in law as the board did not follow the rules and principles of natural justice, the board accepted the disciplinary committee's finding of fact but it does not agree with the recommendation of the disciplinary committee "with regard to punishment".

(d) Through a letter dated 15 August 2007, the DB did invite the appellant to make representation to it under s. 103D(2) of the LPA at its meeting on 6 September 2007. Therefore, the provisions of the LPA were adhered to.

(e) In respect of punishment, it is very clear that under the LPA, the DB does have the jurisdiction and power to impose a fine upon the appellant.

A **Findings Of The Court**

[6] The court agrees with the submission of the respondent that the appellant had breached r. 3(a) of the Etiquette Rules. The rule reads as follows:

B 3. Advocate and solicitor not to accept brief if embarrassed.

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises:

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(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

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[7] As the plaintiff's lawyer in the 1996 Suit, the appellant was no doubt privy to confidential information of the plaintiff. In settling the affidavit for the defendant, the appellant would be doing so armed with that knowledge. The appellant would be doing a disservice to the E defendant. The appellant would not be in a position to advise the defendant independently, as he would have to think of his own client's position.

[8] In my respectful view, there are few of the business relations of F life involving a higher trust and confidence than that of lawyer and client. A lawyer has an ethical obligation to be a zealous advocate for his client, remain royal, and preserve his client's confidence. In the course of a lawyer - client relationship, situation may arise where a lawyer's very involvement in a matter may offend the trust and confidence essential to that relationship. In these situations, though no actual conflict of interest G may exist, an "inherent conflict of interest", ie, the potential for or the appearance of a conflict of interest remains.

[9] In this instant case, the disciplinary committee was right when it found as a matter of fact that the appellant should not have prepared H the affidavit of the other party in the legal proceedings. The appellant had not only prepared it but filed and served it.

[10] In order to preserve the integrity of the lawyer - client relationship when an inherent conflict of interest arises as in this instant case, the appellant should have avoided his involvement in the defendant's case. I By distancing himself from the case in which an inherent conflict of interest exists, the appellant enhances public confidence in the judicial system and avoids causing injury to his former client.

[11] It is settled law that whenever a trust relationship exists, the common law imposes fiduciary duties on the person in the position of trust ie, the trustee or fiduciary. The fiduciary's duties are the most onerous duties imposed by our law. These fiduciary duties are imposed on lawyers who receive confidential information from clients or potential clients. Clearly lawyers are in a fiduciary (trust) relationship with his or her clients. As such, the lawyer must avoid situation where the lawyer has, or may develop, a conflict of interest.

[12] This simple notion is based upon the fundamental principle that a lawyer must provide complete and undivided loyalty, dedication, full disclosure and good faith to all for whom he or she acts. Lawyers are in a unique position because they and their clients enjoy an extremely high level of confidentiality - perhaps lawyers are the only professionals who cannot be compelled to disclose confidential communications (see s. 126 of the Evidence Act 1950). The potential for abuse is obvious - thus obligation on the lawyer to avoid any conflict of interest.

[13] According to Michael T Mihm, Elizaberth A Starrs, in an article entitled "Let's Chat About Conflict Of Interest", Denver, Colorado, November 2008, the rules regulating lawyer's conflict of interest arise out of a number of competing policy concerns. The learned authors said:

> ... The first, and most important, policy concern is the belief that a client has a right to a lawyer who will be loyal to the client and in whom the client can trust. The conflict of interest rules seek to promote trust between the client and the lawyer. Loyalty and trust are ends in themselves.
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> A client benefits from the ability to trust his or her lawyer because the client can be assured that the lawyer will provide legal advice untainted by the claims or interests of another, and that the lawyer will be the client's advocate and protector. The client also benefits because the client can feel free to confide in the lawyer, know that the lawyer will keep those communications confidential, and know that the lawyer will provide legal advice based upon all of the facts, rather than on incomplete facts.
>
> A lawyer also benefits from a client's trust. The lawyer benefits because trust creates an environment in which the client will confide in the lawyer and share all of the pertinent facts. A client's candor and full disclosure permit the lawyer to properly evaluate the facts, to provide the best possible legal advice to the client and, ultimately to protect the client.

A The second policy concern behind the conflict of interest rules is closely related to the first. That policy concern is the interest in enhancing effective legal representation. Conflicts of interest undermine a lawyer's independence and professional judgment. Lawyer's professional judgment is influenced by personal, financial, or professional concerns that compete with the client's, the lawyer may, B consciously or unconsciously, fail to provide the client with accurate or complete legal advice. Indeed, the lawyer's ability to provide effective representation depends upon a client's trust. If a client does not fully trust the lawyer because of concerns about the lawyer's loyalty, the client may not disclose all necessary information to the C lawyer and, thus, may indirectly prevent the lawyer from providing accurate and complete legal advice.

The third policy concern is that a lawyer be a client's protector and vigorous advocate. A conflict of interest may deter a lawyer from representing a client with the appropriate vigor. When a lawyer is tugged by competing loyalties, the lawyer may be tempted to "pull her D punches" for a client. The lawyer may not disclose to the client all options, may fail to sue all of the appropriate parties, may fail to assert all of the appropriate claims or defenses, or may fail to make all of the arguments that the lawyer should make under the circumstances.

In short, conflicts of interest undermine a client's expectation of E effective legal representation and undermine a lawyer's ability to provide effective legal representation.

[14] I gratefully adopt the above statement.

[15] Ultimately, as is so often the case, it is apt to heed the words of F Sir Owen Dixon in a setting the "bar": "Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function itself of the profession is frustrated".

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[16] It has been repeatedly stressed that the practice of law is not a business. It is a profession in which duty to public service, not money is the prime consideration. Lawyering is not meant to be money making venture, which necessarily reaps profits. Making of livelihood should be secondary consideration of lawyers who must be subordinate their H interest. In *Bar Council of Maharashtra v. MV Dabholkar*, etc etc, AIR 1975 SC 2092, it was stated that: "Members of the bar are not a guild of candle makers or butcher's association. They are a class separate".

[17] Concerning the contention of the appellant that he had verbal I consent of the plaintiff in the 1996 suit to act for Kilang Papan, the court agrees with the submission of the respondent that r. 5 of the Etiquette Rules clearly provides that an advocate and solicitor must

obtain the consent of the first party which he acted for in writing before acting for the opposite party in later proceedings. There was no consent in writing here.

[18] I pause here for a moment to say that the first party which the lawyer acted for must have an adequate appreciation of what protection he or she is giving up. The first party's consent must be uncowered and must follow "consultation" - which is communication of information reasonably sufficient to permit the first party to appreciate the significance of the matter in question. This includes a clear explanation of the differing interests involved and a detailed explanation of the risks and disadvantages.

[19] Concerning the appellant's contention that the board has failed to observe the principles of natural justice, I find the contention devoid of merits. The DB's finding of facts are consistent with that of the disciplinary committee. In its letter dated 15 August 2007 to the appellant, the DB clearly states that it does not agree with the recommendations of the disciplinary committee "with regard to punishment". In other words, the disciplinary committee's findings of fact were accepted. It was merely a question of the punishment to be imposed on the appellant.

[20] Contrary to the appellant's position, through a letter dated 15 August 2007, the DB did invite the appellant to make representations to it under s. 103D(2) of the LPA at its meeting on 6 September 2007. The provisions of the LPA were therefore adhered to. It should be noted that the appellant's affidavit in support on this score is inconsistent with the appellant's submissions:

(a) In his Affidavit in Support (paragraph 47), the Appellant does not mention that he attended the Disciplinary Board meeting on 6.9.2007 but merely states that he was not given an opportunity to be heard and before he was heard.

(b) The DB's Affidavit then points out that the Appellant was in fact given an opportunity to be heard (paragraph 6.1) at the DB's meeting on 6.9.2007. This is entirely consistent with the DB's letter of 6.9.2007 (found at Appellant's Affidavit, page 248) which states *inter alia* that:

> We write to advice you that the Disciplinary Board at its meeting held on 6 September 2007 considered the above complaint and the Report of the Disciplinary Committee and upon hearing you and your counsel, ordered that the fine of Ringgit Malaysia Three Thousand (RM3,000.00) be imposed on you.

A (c) It is only now that the Appellant says he did attend the hearing before the DB, but that the Order was given before he had a chance to make out his case. With respect, this is a submission from the Bar unsupported by any statement on oath, and must be disregarded. It is also contrary to the letter of the DB dated 6.9.2007 which clearly states that the Appellant and his counsel
B were heard on 6.9.2007.

DB Has Power To Impose A Fine

[21] It is very clear that under the LPA, the DB does have the jurisdiction and power to impose a fine upon the Appellant. The
C following sections of the LPA (prior to the amendments in 1996) are relevant:

Section 103C

(1) After hearing and investigating any matter referred to it a
D Disciplinary Committee shall record its findings in relation the facts of the case and according to those facts shall determine and make any one of the following recommendations to the Disciplinary Board:

(a) …

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(b) That while no cause of sufficient gravity for disciplinary action exist the advocate and solicitor should be reprimanded; or

(c) That there is sufficient merit in the complaint and that the
F advocate and solicitor should be subject to one of the following disciplinary actions:

(i) imposition of a fine upon the advocate and solicitor for such sum as the Disciplinary committee deems just;

G (ii) ….

(iii) ….

Section 103D

(1) After consideration of the report of the Disciplinary committee,
H the Disciplinary Board may make an order:

(a) affirming the recommendations of the Disciplinary Committee; and

(b) may either accept the recommendations of the Disciplinary
I Committee of the punishment to be imposed, or in exceptional cases, impose a greater punishment.

(2) ....

(3) Where the Disciplinary Board does not agree with the recommendations of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.

[22] In view of the above, the appellant's contention that the DB has no power to impose a fine is misconceived.

Conclusion

[23] In the circumstances, I would dismiss this appeal with costs.